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Before The
State Of Wisconsin
DIVISION OF HEARINGS AND APPEALS

In the Matter of the Krueger Lumber Company's
Petition for a Contested Case Hearing to Review
the Department's Decision Regarding Timber Sales
Contract No. 35 (Jackson Marsh Timber Sale) and
the Department's Retention of Krueger Lumber
Co., Inc.'s \$11,283.48 Performance Bond as
Settlement of Damages Owed the Department

Case No.: IH-99-10

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Krueger Lumber Company, Inc., entered into Timber Sale Contract No. 35 (Jackson Marsh Timber Sale) with the Department of Natural Resources (Department) on February 17, 1994. The contract required Krueger Lumber Company, Inc., to post a performance bond to guarantee its contract performance. The performance as described in the contract was not completed by Krueger Lumber Company, Inc., during the period of the contract. By letter dated March 15, 1999, the Department informed Krueger Lumber Company, Inc., that it determined that it failed to complete the performance described in Timber Sale Contract Number 35. The Department retained the performance bond for damages incurred by the Department because of the Company's failure to perform.

Krueger Lumber Company, Inc., petitioned the Department, under sec. 227.42, Stats., on June 7, 1999, to review the decision of the Department to retain the performance bond. By letter dated June 23, 1999, the Department granted the request for a contested case hearing. On September 1, 1999, the Department filed a Request for Hearing with the Division of Hearings and Appeals. Pursuant to due notice the Division of Hearings and Appeals conducted a hearing on December 15, 1999, in Manitowoc, Wisconsin. Mark J. Kaiser, Administrative Law Judge, presided.

In accordance with secs. 227.47 and 227.53(1)(c), Stats., the PARTIES to this proceeding are certified as follows:

Krueger Lumber Company, Inc., by

Attorney Scott Lawrence
Lawrence & Des Rochers, S.C.
P. O. Box 117
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Wisconsin Department of Natural Resources, by

Attorney Jimmy Christenson
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FINDINGS OF FACT

1. Herbert Krueger is the president of the Krueger Lumber Company, Inc. (Krueger Lumber). Krueger Lumber operates a sawmill at 21324 United States Highway 151, Valders, Wisconsin.

2. In February 1994, Krueger Lumber entered into a contract with the Department of Natural Resources (Department) to purchase, cut, and remove specified trees from the Jackson Marsh Wildlife Area. Pursuant to the contract, Krueger Lumber agreed to complete the work described in the contract by February 18, 1996. Also pursuant to the contract, Krueger Lumber was required to post a performance bond in the amount of \$11,283.48. The contract provided that the performance bond would be forfeited to the Department as liquidated damages upon the Department's determination that Krueger Lumber had breached a condition or term of the contract.

3. The Jackson Marsh Wildlife Area is located in Washington County. The area that was the subject of the timber sale contract is an 83-acre site characterized by mucky soils. Logging activity in the Jackson Marsh Wildlife Area can only occur during winter months when the ground is solidly frozen or in the autumn after an extraordinarily dry summer.

4. During January 1995, a crew contracted by Krueger Lumber attempted to construct a logging road into the Jackson Marsh Wildlife Area to commence harvesting the timber specified in the contract. Krueger Lumber was unsuccessful in its efforts to construct a logging road and no timber was cut.

5. Krueger Lumber made no further efforts to cut the specified timber prior to the deadline in the contract. By letter dated February 16, 1996, Jamie Waite, a forester employed by Krueger Lumber requested that the Department grant Krueger Lumber a one-year extension to complete the required work. By letter dated February 26, 1996, the Department denied Krueger Lumber's request for an extension. The February 26, 1996, letter further advised Krueger Lumber that after the timber was sold to another contractor, the damages sustained by the Department would be calculated and deducted from the performance bond.

6. In November 1996, the Department entered into a contract with Ort Lumber Company, Inc. (Ort) to cut and remove timber from the Jackson Marsh Wildlife Area (Timber Sale Contract No. 42). The contract differed in several respects from the previous contract with Krueger Lumber. The differences included:

Using more of the cut log to increase utilization. The initial standard required the contractor to use the merchantable parts of the tree larger than 10 inches. The new standard requires the contractor to use all merchantable parts of the tree over 7 inches.

Salvaging all recently broke off and uprooted wind damaged trees. These trees were standing when the sale was first contracted.

Planting the landing site to permanent prairie grass cover after sale completion. The seeds are provided by the DNR to control species composition.

Pulling the harvested tops 50 or more feet from the creek edge. This action will help control creek debris that may cause future flooding.

Restricting harvesting equipment from operating closer than 25 feet of the creek edge. This restriction will control soil disturbance leading to soil erosion and water quality damage.

Limiting the refueling of harvesting equipment to one designated area within the landing site. Cleanups of spills will be kept to one location.

Additionally, under the new contract the timber sale was sold on a lump sum basis as opposed to a scaled sale under the contract with the contract with Krueger Lumber.

7. During the winter of 1996-1997, Ort froze down a logging road and harvested approximately one-half of the timber to be cut. During the fall of 1997, Ort started packing down the site again; however, in late January 1998, the Department of Natural Resources ordered Ort to not cut in the marsh because the ground was not solidly frozen in the area. The contract with Ort terminated in October 1998. The Department gave Ort an extension and Ort completed cutting in the area in mid-February of 1999.

8. Krueger Lumber is not disputing that it breached its contract with the Department; however, it is arguing that its fulfillment of the contract was made impossible or frustrated by weather conditions. Although weather conditions for cutting in the marsh were not ideal during the period when Krueger had the contract, the weather was not so unfavorable that it could be found that it was impossible for Krueger Lumber to complete its obligations under the contract.

9. Krueger Lumber also presented photographic evidence that Ort did not satisfy all the conditions of the contract. Specifically the photographs show trees marked for cutting that were left standing, some fallen trees that were not removed from the marsh, and deep rutting. Krueger Lumber presented this evidence as further proof that fulfillment of the contract conditions was impossible under the weather conditions during the contract period. The Department witnesses acknowledged that Ort did not cut and/or remove all marked timber; however, they were satisfied that Ort substantially completed working on the contract and the objective of the timber sale, reduction of the basal area in the marsh, was accomplished. There is no evidence that the Department would have held Krueger Lumber to a higher completion standard that it did Ort.

10. Krueger Lumber did begin constructing a logging road; however, they did not continually pack it to "freeze down" a road. The Department witnesses testified that during the time period Ort was cutting timber in the marsh, it had heave equipment continually packing down a logging road. This is necessary in areas with mucky soil and unfavorable weather conditions (temperatures not sufficiently cold to solidly freeze the soil or an area with an insulating snow cover). The Department witnesses believe that Krueger Lumber was not willing to devote the resources necessary to freeze down a road into the marsh that would have allowed it to begin cutting timber. Although not argued by Krueger Lumber, the suggestion is that under the terms of its contract with the Department, Krueger Lumber believed it could not have

profitably harvested the timber in the marsh if it had contracted for the equipment necessary to freeze down a road. The contract with Ort was a lump sum sale, which is generally more profitable for the contractor. Based upon Krueger Lumber's experience, the Department may have modified the contract to increase the profitability of the sale to the contractor.

The issue in this case is not whether Krueger could have profitably harvested the timber under the terms of its contract with the Department, but whether it was impossible for Krueger Lumber to fulfil its obligations under the contract. It appears that if Krueger Lumber Company had been willing to incur the expense of devoting sufficient heavy equipment to freezing down a logging road into the marsh during the winters of 1994-1995 and/or 1995-1996, it could have completed the required cutting. The weather conditions during the winters of 1994-1995 and 1995-1996 were not so extreme that performance of the contract became impossible. Additionally, the Department witnesses testified that if Krueger Lumber had made a good faith effort to begin cutting during the contract period, they would have granted Krueger Lumber an extension of the contract.¹ According to the Department's "Timber Sales Handbook," bad weather is a valid reason for extending a timber sale contract.

11. The parties stipulated that if it was found that Krueger Lumber breached the contract, the Department's damages for the breach is the amount of liquidated damages set forth in the contract, specifically \$11,283.48.

CONCLUSIONS OF LAW

1. Krueger Lumber Company, Inc., breached the conditions of Timber Sales Contract No. 35 (Jackson Marsh Timber Sale), by failing to complete the work required pursuant to the contract by February 18, 1996. The breach was not caused by a supervening event that made performance of the contract impossible for Krueger Lumber Company, Inc.

2. The damages sustained by the Department of Natural Resources as a result of Krueger Lumber Company's breach is the amount of liquidated damages set forth in the contract, \$11,283.48.

3. The Division of Hearings and Appeals has authority to issue the following order pursuant to sec. 227.43(1)(b), Stats.

¹ The record contains a contract extension for Timber Sales Contract No. 35 dated November 14, 1995 (Exh 23) The extension is for fourteen months and is executed by the Department. A witness for Krueger Lumber testified that this extension was never offered to Krueger Lumber. However, at least in 1995, the Department was apparently willing to grant an extension.

ORDER

The retention of the performance bond posted by Krueger Lumber Company, Inc., pursuant to Timber Sales Contract Number 35 (Jackson Marsh Timber Sale) by the Department of Natural Resources as liquidated damages for Krueger Lumber Company, Inc., breach of the contract is AFFIRMED.

Dated at Madison, Wisconsin on January 13, 2000.

STATE OF WISCONSIN
DIVISION OF HEARINGS AND APPEALS
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By: Mark Kaiser
MARK J. KAISER
ADMINISTRATIVE LAW JUDGE

NOTICE

Set out below is a list of alternative methods available to persons who may desire to obtain review of the attached decision of the Administrative Law Judge. This notice is provided to insure compliance with sec. 227.48, Stats., and sets out the rights of any party to this proceeding to petition for rehearing and administrative or judicial review of an adverse decision.

1. Any party to this proceeding adversely affected by the decision attached hereto has the right within twenty (20) days after entry of the decision, to petition the secretary of the Department of Natural Resources for review of the decision as provided by Wisconsin Administrative Code NR 2.20. A petition for review under this section is not a prerequisite for judicial review under secs. 227.52 and 227.53, Stats.

2. Any person aggrieved by the attached order may within twenty (20) days after service of such order or decision file with the Department of Natural Resources a written petition for rehearing pursuant to sec. 227.49, Stats. Rehearing may only be granted for those reasons set out in sec. 227.49(3), Stats. A petition under this section is not a prerequisite for judicial review under secs. 227.52 and 227.53, Stats.

3. Any person aggrieved by the attached decision which adversely affects the substantial interests of such person by action or inaction, affirmative or negative in form is entitled to judicial review by filing a petition therefor in accordance with the provisions of sec. 227.52 and 227.53, Stats. Said petition must be filed within thirty (30) days after service of the agency decision sought to be reviewed. If a rehearing is requested as noted in paragraph (2) above, any party seeking judicial review shall serve and file a petition for review within thirty (30) days after service of the order disposing of the rehearing application or within thirty (30) days after final disposition by operation of law. Since the decision of the Administrative Law Judge in the attached order is by law a decision of the Department of Natural Resources, any petition for judicial review shall name the Department of Natural Resources as the respondent. Persons desiring to file for judicial review are advised to closely examine all provisions of secs. 227.52 and 227.53, Stats., to insure strict compliance with all its requirements.